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No. 10

Supreme Court, U.S.
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In The

Supreme Court of the United States

STEVE J. WILL,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

MARK A. EISENBERG
Counsel of Record

EISENBERG LAW OFFICES, S.C.
308 E. Washington Avenue
P. O. Box 1069
Madison, WI 53701-1069
(608) 256-8356
mark@eisenberglaw.org

Attorney for Petitioner
Steve J. Will

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Did police officers violate Mr. Will's rights under the Fourth Amendment to the United States Constitution and Article I, Section 11, of the Constitution of the State of Wisconsin when Mr. Will's vehicle was stopped and Mr. Will was seized without reasonable suspicion?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Steve J. Will, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Court of Appeals, District IV, filed on August 12, 2010. This Court should accept review of this case because a decision by the Supreme Court will help develop the law regarding the standard for evaluating whether an investigatory stop by law enforcement officers is justified by reasonable suspicion. The question presented is a novel one insofar as it asks whether an individual's proximity to an area where criminal activity is suspected to be taking place, standing alone, provides sufficient reason for a law enforcement officer to make an investigatory stop. The resolution of this real and significant question of federal and state constitutional law will have a nationwide impact, as do such cases as *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), and its progeny. Further, the Wisconsin Court of Appeals' decision conflicts with the United States Supreme Court decision in *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 693 (2000), where the Court stated that an individual's presence in a high crime area standing alone is not enough to support a reasonable, particularized suspicion of criminal activity, but that whether a stop occurred in a "high crime area" is among the relevant contextual considerations analyzed in determining whether reasonable suspicion was established.

In Mr. Will's case, the only contextual consideration offered by the State is that he was present in an

area where criminal activity was suspected. Unlike in *Wardlow*, he did not flee or draw attention to himself by any means beyond his mere presence. Accordingly, the Court of Appeals should have found that the stop and subsequent seizure of Mr. Will was unreasonable and, therefore, unconstitutional.

OPINIONS BELOW

The opinion of the Wisconsin Court of Appeals, District IV, which was unpublished, was issued on August 12, 2010, and is attached at pages A-1-10. The Wisconsin Supreme Court's order denying review is attached at pages A-12-13. The trial court's order denying the motion to suppress is attached at page A-11.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the Wisconsin Court of Appeals for which petitioner seeks review was issued on August 12, 2010. The Wisconsin Supreme Court order denying petitioner's timely petition for discretionary review was filed on January 11, 2011. This petition is filed within 90 days of the Wisconsin Supreme Court's denial of discretionary review, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the Constitution of the United States provides, in pertinent part, that " . . . the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated."

STATEMENT OF THE CASE

On or about October 10, 2008, Cory Miller, a deputy with the Columbia County Sheriff's Department, asked Village of Rio Police Officer Jeff Becker to initiate a traffic stop on Steve Will's truck with a license plate of 433245, which was on its way into Rio, Columbia County, Wisconsin. Deputy Miller had requested the stop because at approximately 9:00 p.m. on that date someone had tripped an alarm that had been placed in a cornfield by police officers where a marijuana grow operation was allegedly occurring. Approximately 20 minutes after the alarm was tripped, Mr. Will's vehicle was seen by Deputy Miller driving along Highway C in Columbia County. It was headed to Rio.

Eventually Deputy Miller caught up to the vehicle and initiated a traffic stop. Mr. Will appeared to be intoxicated. Mr. Will was eventually charged in a Criminal Complaint filed with the court on December 2, 2008, with operating a motor vehicle while intoxicated – third offense and operating a motor vehicle

with a prohibited alcohol concentration – third offense (R.1).

On or about June 9, 2009, Mr. Will filed a motion and notice of motion to suppress an illegal stop/arrest (R.6).

An evidentiary hearing was held on August 31, 2009, to suppress the evidence (R.22). After taking testimony and without giving either side an opportunity to argue the motion, the court ruled from the bench (R.22, pp.34-38). The court found that Deputy Miller did have a reasonable articulable suspicion to stop Mr. Will's vehicle and denied the motion to suppress.

Shortly thereafter, Mr. Will changed counsel (R.7). His new counsel filed a request for reconsideration in a letter dated October 19, 2009 (R.8). The court then scheduled a reconsideration hearing, which was held on December 4, 2009 (R.23). At that time argument was made concerning the motion. The court, after considering the arguments, upheld its initial decision to deny the motion to suppress (R.23, p.26). This ruling was reduced to a written order and signed by the court on December 8, 2009 (R.9).

On February 3, 2010, Mr. Will entered a conditional plea and was sentenced to 30 days in jail with work release, a $1,219.00 fine inclusive of costs, and a 24-month revocation of his driving privileges (R.24, pp.6, 7). The court was notified of Mr. Will's intent to seek post conviction relief and agreed to stay execution of all of the terms and penalties until a decision

from the Court of Appeals (R.24, p.7). Mr. Will timely filed a Notice of Appeal on or about March 10, 2010 (R.17). In a decision dated August 12, 2010, the Court of Appeals affirmed the Judgment of Conviction. (App. A-1).

Mr. Will sought review in the Wisconsin Supreme Court, making the same constitutional argument and citing the same basic authorities set forth above. The Wisconsin Supreme Court denied review by order on January 11, 2011.

STATEMENT OF THE FACTS

On October 8, 2008, Deputy Cory Miller from the Columbia County Sheriff's Department was stationary in his squad car on Highway C and Hall Road in Columbia County, Wisconsin (R.22, p.4). At approximately 9:00 p.m. that evening, he had responded to an active alarm that had been set up in a cornfield (R.22, p.5). The alarm had been set up by police officers because marijuana plants were alleged to have been growing in this cornfield. The alarm was basically a trip wire and would be set off by someone walking over it (R.22, p.5). At that time it was dark. (*Id.* at 5). The field was on the north side of Hall Road approximately a quarter mile from the area that Deputy Hall was stationed at the corner of Hall Road and Highway C (R.22, p.5). The terrain in the area was generally flat and rural with lots of cornfields and farms (R.22, pp.5, 6). Deputy Hall's assignment

was to remain stationary on Highway C at Hall Road in an effort to essentially watch traffic and/or stop a suspect if he or they would come out of the grow operation area (R.22, p.6). Approximately 20 minutes after he arrived at the location, he observed a black Chevy truck heading westbound on Hall Road toward Highway C (R.22, pp.7, 8). It was the first vehicle that he had seen during the 20-minute period on that stretch of road (R.22, p.7). As the vehicle stopped at the stop sign on Hall Road and Highway C, he observed one male operator in the vehicle. He did not see anyone else inside (R.22, p.8). He had not been given any physical description of any suspect in the marijuana grow operation (R.22, p.8). As the vehicle turned north onto Highway C, Deputy Miller shined his flashlight on the license plate and obtained the license plate number of the vehicle (R.22, p.9). At that time he also attempted to make contact with anyone who was familiar with the suspects to see if this vehicle was possibly involved. He was not successful in making contact with any other police officer who had information about suspects linked to the grow operation (R.22, p.9).

Hall Road is a road approximately two miles long, with one end at Highway C (R.22, p.10). Initially another deputy was supposed to be on the other end of Hall Road, but that deputy was reassigned to a different location (R.22, p.10). There was no way to determine whether any vehicle traveling on Hall Road had come from the grow operation or from some other area.

At the time Deputy Miller was stationed at Hall Road and Highway C, two other deputies were hiding near the grow operation attempting to view the suspects at the grow site. Nobody heard from the other deputies until later that evening after they arrested the suspects (R.22, p.11).

After the truck passed Deputy Miller, he attempted to gather information as to whether someone driving that truck was possibly a suspect (R.22, p.12). After he was unable to do that, he began driving north on Highway C and eventually came upon the vehicle approximately eight to ten miles away (R.22, p.11). As he observed the same black Chevy truck that he had seen at the corner of Hall Road and Highway C, he initiated a traffic stop because he believed it was possible it could have been a suspect from the grow operation (R.22, p.12).

After the vehicle was stopped, Deputy Miller made contact with Mr. Will, the driver. Mr. Will had no idea why he was stopped (R.22, p.13).

Deputy Miller's duty was to wait at the intersection of Hall Road and Highway C and wait for the deputies who were hidden in the cornfield to tell him when the suspects were leaving (R.22, p.17). His job was to stay put and monitor the traffic until the deputies told him that the suspects were leaving (R.22, p.17). Deputy Miller indicated it was possible that a vehicle involved in the grow operation could have easily traveled out the other end of Hall Road (R.22, p.18).

Deputy Miller was not totally familiar with the alarm setup. He knew that it was essentially a fish line that is pulled across an area and attached to an alarm system. If thick deer came running through the field, that could trip the alarm, as well (R.22, p.19).

After Deputy Miller saw Mr. Will's vehicle at the corner of Highway C and Hall Road, he attempted to make contact with the hidden deputies. He radioed that he had observed a black vehicle westbound on Hall Road (R.22, pp.19, 20). The two deputies who were hidden in the cornfield did not respond to him (R.22, p.20). The deputies had been there for a long period of time and would have been able to see the alarm being tripped (R.22, p.21). The deputies who had been hidden had actually seen the suspects at some point (R.22, p.21).

Deputy Miller was asked at the motion hearing by the court whether the police officers who were hidden in the cornfield did not want to talk because they were fairly close in proximity to the suspects (R.22, p.23), and they did not want the suspects to hear them talking to Deputy Miller over their radios. If that was the case, the suspects were still in the cornfield when Deputy Miller attempted to contact the covert police officers in an attempt to get more information about the black truck that was driving by him. This would further negate his belief that Mr. Will and/or his vehicle was involved in this operation.

Deputy Miller pulled Mr. Will's vehicle over simply because he believed Mr. Will may "possibly be

a suspect or someone involved in the operation" (R.22, p.10). He did not observe Mr. Will commit any traffic violations (R.22, p.25).

Mr. Will's attorney filed a motion to suppress on or about June 9, 2009 (R.6; App. A-9). At the suppression motion on August 31, 2009, without giving either counsel an opportunity to argue, the court found that Deputy Miller had a plausible reason for the necessity of stopping the defendant's vehicle (R.22, p.38). The court then denied the motion to suppress (R.22, p.38).

On October 19, 2009, the defendant filed a letter brief and requested reconsideration of the court's decision (R.8; App. A-16). The court held a hearing on the motion for reconsideration on December 4, 2009 (R.23). The court found that there was no question that as it turned out, this defendant was an innocent person in that he was not involved in the drug grow operation (R.23, p.4). The court further found that Deputy Miller had not observed any traffic violations and there was nothing wrong with Mr. Will's driving (R.23, p.5). There was no reason that Mr. Will should not be driving on that road (R.23, p.5). The court further found that the police officers in the field would not answer Deputy Miller's call because they did not want to give themselves away, so to speak, to the people who were still actually in the marijuana grow field (R.23, p.7).

After listening to arguments of both counsel, the court held:

> Under the totality of the circumstances that Deputy Miller was faced with, the court is – is finding that he did have a reasonable belief to stop this vehicle and investigate based on literally – and I understand this and that's what causes me the most problems – and if this is appealed, I might be shown to be absolutely, utterly wrong – but under these circumstances, that he was not being unreasonable in stopping the Will vehicle once he was not able to make contact with the deputies in the field given what was happening.

(R.23, p.26)

The oral decision was reduced to a written order on December 8, 2009 (R.9; App. A-19).

On appeal, the Court of Appeals affirmed this decision, concluding that Deputy Miller had reasonable suspicion to stop Mr. Will's vehicle in light of the nature of information and alternatives available to him. (Decision, ¶ 13; App. A-5.) Because he knew that criminal activity was taking place in the area, because he did not have a more specific description to work with, and because he might have lost the opportunity to investigate Mr. Will's potential connection to the criminal activity while Mr. Will was readily available and might have evidence of the crime with

him, the court held that Deputy Miller was justified in making his stop. (Decision, ¶ 17; App. A-7.)

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE POLICE OFFICER DID NOT HAVE REASONABLE SUSPICION TO STOP MR. WILL'S VEHICLE AND SEIZE HIS PERSON AND THE DECISION OF THE WISCONSIN COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

The Fourth Amendment to the United States Constitution and Article I, Section 11, of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. Wisconsin Courts, in construing Article I, Section 11, of the Wisconsin Constitution, consistently follow the United States Supreme Court's interpretation of the Fourth Amendment. *State v. Betterley*, 191 Wis.2d 407, 417, 529 N.W.2d 216 (1995).

The key inquiry in determining if a stop is constitutional as discussed in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), and codified in Wisconsin Statute § 968.24 is whether reasonable suspicion exists that a person is committing, is about to commit or has committed a crime. This Court defines reasonable suspicion by looking at the totality of the circumstances, *United States v. Cortez*, 449 U.S. 411, 417,

101 S.Ct. 690 (1981), and balancing the interests of society in solving crime against members of that society being free from unreasonable intrusions, *United States v. Hensley*, 469 U.S. 221, 226, 105 S.Ct. 675, 679 (1985).

The standard for a valid investigatory stop is less than that for an arrest; an investigatory stop requires only reasonable suspicion. *State v. Allen*, 226 Wis.2d 66, 70, 71, 593 N.W.2d 504 (Ct. App. 1999). The reasonable suspicion standard requires the officer to have a particularized and objective basis for suspecting the person stopped of criminal activity. *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657 (1996). Reasonable suspicion cannot be based merely on an inchoate and unparticularized suspicion or hunch. *Terry*, 392 U.S. at 27, 88 S.Ct. 1868. When determining if the standard of reasonable suspicion was met, those facts known to the officer at the time of the stop must be taken together with any rational inferences and considered under the totality of circumstances. Stated otherwise, to justify an investigatory stop, the police must have a reasonable suspicion grounded in specific articulable facts and reasonable inferences from those facts that an individual is or was violating the law. *State v. Gammons*, 241 Wis.2d 296, 625 N.W.2d 623 (Ct. App. 2001).

The question then becomes what combination of facts and circumstances will suffice to establish reasonable suspicion. While there is no litmus paper test to resolve the issue, it is possible to identify several factors which should be appropriately taken into account in making the judgment. According to

W. LaFave, Search and Seizure, § 9.5G at 550-570 (4th ed. 2004), there are six factors that should be considered. These include: (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

(1) Particularity of Description.

Based on the totality of circumstances, the officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. *Cortez*, *supra*, at 418, 101 S.Ct. at 695. There must be raised a suspicion that the particular individual being stopped is engaged in wrongdoing. *In the Matter of A.S.*, 614 A.2d 534, 537 (D.C. Ct. App. 1992).

In looking at the description of the suspects, undoubtedly physical characteristics such as race, gender, ethnicity, hair color, facial features, age, body build or apparel of a suspect permits winnowing of innocent travelers. See *W. LaFave*, Search and Seizure, § 9.4G at 195, 196 (3d ed. 1996 and 2000 Supp.).

In addition, *LaFave* explains:

> Quite obviously it is also of considerable help if it is known that the offender actually or

> likely left the crime scene in a vehicle. And if a vehicle is involved, it is extremely useful to know something about the appearance of the car, such as its color, condition, special equipment, vintage or manufacturer, to have even part of a license plate number, or to know the number of occupants. This type of information is often very helpful notwithstanding the existence of detailed information about the offender's personal appearance, for the latter may be of little use when the offender is traveling by car and surveilling police cannot determine without first making a forcible stop whether any particular potential suspect has those characteristics.
>
> He continues:
>
> In essence, the more detail and unique the description of the suspects, the more likely the police will have authority under the Fourth Amendment to make a *Terry* stop because the potential persons on the road matching the description will be fewer.

Id.

In assessing both the quality and quantity of the details of the description, the most important consideration is whether the description is sufficiently unique to permit a reasonable degree of selectivity from the group of all potential suspects. *Id.*, cited in *Stokes v. State*, 362 Md. 407, 422, 423, 765 A.2d 612, 620 (Ct. App. Md. 2001).

In the present case there was no description whatsoever of the suspect and/or the vehicle in which the suspect allegedly arrived to the grow operation (R.22, p.8). In fact, the only advice Deputy Miller had was that another deputy had told him over the radio that anybody leaving the area "could possibly" be a suspect from this operation.

Deputy Miller could have gotten a description of either the vehicle, if there was one, and/or the suspects, if there were any. He knew that deputies that were hiding in the field had observed the suspects (R.22, p.16). The deputies were hidden and were supposed to tell him when the suspects were leaving (R.22, p.17). He even radioed the description of Mr. Will's vehicle to those officers in an attempt to confirm whether or not that was a vehicle that had left the grow operation (R.22, p.20). They never responded (R.22, pp.20, 22).[1] Since there was no description of the alleged suspects or any vehicles in which the suspects allegedly were traveling, this factor counts heavily against the State.

Deputy Miller indicated that the police officers did not want to talk to him because they were in fairly close proximity to the suspects (R.22, p.23). If in fact that was the case and it was 20 minutes after

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[1] An inference could be made that the officers did not respond because the description of the vehicle given to the covert officers did not match any vehicles in which the officers saw the suspects.

the alarm was tripped, Mr. Will driving through the area could not have been one of the suspects. Had the suspects left, the police officers would have corresponded with Deputy Miller and informed him that the suspects were leaving the area because they were no longer within earshot of the suspects. This again rebuts any potential reasonable suspicion that Deputy Miller had to stop Mr. Will's vehicle.

(2) The Size of the Area.

In *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 693 (2000), the court found that an individual's presence in a high crime area standing alone is not enough to support a reasonable particularized suspicion of criminal activity, but a location's characteristics are relevant in determining whether the circumstances are sufficiently suspicious to warrant further investigation. *Id.* at 528 U.S. at 124, 120 S.Ct. at 676. Here there was nothing, other than Mr. Will driving through the area, which caused the police officer to "suspect him." When the police officer shined his flashlight on Mr. Will, Mr. Will did not take evasive action. He did not speed up his vehicle. He simply stopped at the stop sign and continued driving. He was not nervous or evasive. Those factors may have led the police officer to investigate further, but they are absent here.

In *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637 (1979), police officers observed a defendant and another man walking away from one another in an

alley in an area which had a high amount of drug traffic. There was no indication that it was unusual for people to be in that alley, and the officer was unable to point to any facts supporting his conclusion that the situation in the alley looked suspicious. The court held that it did not justify a reasonable suspicion that the defendant was involved in criminal activity and his detention was not warranted.

Other lower court rulings have followed the reasoning in *Brown*. In *United States v. Cohen*, 41 F.3d 896 (6th Cir. 2007), police officers responded to a "trouble run." They saw the defendant's vehicle leave an area from which a 911 hang up call came. The defendant's car was stopped because he had just been in the area. There was no description of the defendant or his vehicle. There was nothing to help the officers determine the identity of any perpetrator. While there was a quick response by the police officers to the 911 hang up call and it was early in the morning, which limited the number of people in the general area, those limitations fell short of identifying a determinate person. The court suppressed the search.

In *State v. Fitzgerald*, 36 Or. App. 473, 584 P.2d 785 (1978), the police officer heard a radio report that a burglary was in progress. He proceeded to the area within a minute or so. He was within an eighth to a quarter of a mile from the scene of the burglary when he saw the defendant's vehicle pull into a parking lot and turn off his lights. The court held that those facts amounted to no more than a hunch that the

defendant was involved in some criminal activity, and the court suppressed the search.

In *State v. Washington*, 284 Wis.2d 455, 700 N.W.2d 305 (Ct. App. 2005), the defendant was stopped in an area for loitering in an area where drug sales allegedly occurred. One of the police officers had recognized him from past encounters, and they ordered him to stop. He had a towel in his hand, and he threw the towel into the air, which also contained a bag of cocaine. The court determined that the critical question was whether the officers had the right to tell the defendant to stop. He insisted that he was walking down the street, which he had the right to do, and was spotted in front of a suspected drug house. He argued that what the officers thought about him from past contacts was irrelevant and the stop was unreasonable. The court concluded that people, even convicted felons, have a right to walk down the street without being subjected to unjustified police stops.

The rationale in *Washington*, *supra*, is relevant to the present case. Like *Washington*, Mr. Will was simply driving near, not in, but near an area where some drug activity was allegedly ongoing. There was no proof that Mr. Will was involved in any of the drug activity, as there was no description given of him or his vehicle that would link him to the criminal activity. He had every right to be on that road at that time of night, and he had the right to be free from the seizure of his person that occurred ten miles down the road as he entered the Village of Rio.

(3) The Number of Persons in the Area.

Deputy Miller testified that Mr. Will's vehicle was the first vehicle that he had observed in the area. The problem, however, is that nobody was on the other end of Hall Road. Anybody could have entered the premises from Hall Road, or the suspects could have left the grow operation area by going in the opposite direction on Hall Road from which Mr. Will was traveling. While his was the only vehicle seen in the area by Deputy Miller, there is nobody who could testify that other vehicles did not travel in the opposite direction. Further, Deputy Miller did not see the vehicle until approximately 20-30 minutes after the alarm was tripped. This factor is simply irrelevant.

(4) The Known or Probable Direction of the Offender's Flight.

As stated above, there is no known direction of flight in this case. Deputy Miller indicated that the officer set to patrol the other end of Hall Road was called away. Therefore, the suspects could easily have gone east on Hall Road instead of west on Hall Road. Courts have upheld stopping suspects when the police knew the direction in which they were thought to be going. This is more troubling for the defendant when the police are assisted with information from victims or witnesses indicating that the offender was headed in a certain direction or had taken a certain road. See *United States v. Jones*, 998 F.2d 883 (10th Cir. 1993), wherein the general description was insufficient as

the police had no idea what direction the men were traveling.

In this case, the police had no idea whether any suspects had even left the area. They had no description. They certainly did not know any direction in which the suspects were traveling. This factor weighs heavily against the State.

(5) Observed Activity by the Particular Person Stopped.

Sometimes when the description of the individual is insufficient, it may be permissible to stop a person because of the added fact of suspicious conduct on his part. Types of behavior that have been considered suspicious are leaving the area in an unusually fast speed, driving away in darkness or semi-darkness without lights, frantically trying to gain entry to premises, ducking out of sight, hiding, taking a circuitous route, trying to avoid police or looking back at the police. *W. LaFave*, Search and Seizure, § 9.5G at 568 (4th ed. 2004).

The facts in the present case are similar to those in *State v. Warner*, 172 Vt. 552, 773 A.2d 273 (Vt. 2001). There, a police officer responded to a report of an attempted automobile break-in at an apartment complex. The complainant informed the police that the suspect had run off into the nearby woods. The officer arrived shortly after the complaint was called in and proceeded to drive around the area. Another officer radioed that police officer and told him that a

car had just driven near the area of the apartment complex alleged break-in. He observed the car nearby. At that point 20 minutes had elapsed since the break-in had been reported. The officer began to follow the car and called in the registration. The officer knew the owner of the vehicle. After the car traveled approximately two miles, it turned off into a driveway, and the driver turned off its headlights. The officer continued to watch the car, and after a few minutes he observed the car's headlights turn on. The car then resumed travel down the street. The officer followed the car for a short distance and then effected a traffic stop of the vehicle. He had not observed the defendant engaged in any unlawful conduct. He testified that he stopped the defendant's car because it was suspicious activity to him that the operator was attempting to avoid him. The Supreme Court of Vermont suppressed the evidence.

The State argued that there was suspicious activity in the form of the defendant pulling into the driveway and turning off his headlights for a few minutes. The court found that the officer lacked a reasonable and articulable suspicion of criminal activity to justify the stop. The facts were that a local man was driving down a public street at 8:30 in the evening traveling in the direction of his home. He stopped in a driveway approximately 30 minutes after the call in of the break-in and two miles from the reported criminal activity. There was no reason to suspect he was involved in criminal activity.

Those facts are very similar to the facts in the present case. Mr. Will was driving down a public street at approximately 9:00 p.m. (R.22, p.5). Deputy Miller had not been told to look for a particular suspect from the grow operation. He observed the male operator of the vehicle (R.22, p.8). He obtained the license plate of the vehicle. After running a check on the plate, Deputy Miller would have known that the vehicle's owner lived in Wyocena and that was the direction he was taking home. Because the police officer did not observe any suspicious behavior on the part of Mr. Will, this factor weighs heavily against the State.

(6) Knowledge or Suspicion that a Person or Vehicle Has Been Involved in Other Criminality on Earlier Occasions.

This factor would occur when either a description of an individual or a description of his or her vehicle had occurred in the past from other criminal activity. This factor is really irrelevant in this matter because there is no description of Mr. Will as being at the scene, nor is there any description of a black truck like his vehicle being involved in any previous criminal activity.

In light of totality of the circumstances and the six factors to be considered that are cited above, Deputy Miller clearly lacked reasonable suspicion to stop Mr. Will's vehicle. Though the Wisconsin Court of Appeals said that it considered these factors in

making its decision, it is clear that it failed to give them meaningful consideration and instead focused on the purportedly exigent circumstances facing the officer in order to justify the stop.

In discussing the exigent circumstances justifying the stop, the Court of Appeals focused on three factors that it found relevant to a determination of whether an investigatory stop is reasonable: (1) whether alternative means of further investigation are available, short of an investigative stop; (2) whether the opportunity for further investigation would be lost if the officer does not act immediately; and (3) what actions following the stop would be necessary for the officer to determine whether to arrest or release the suspected individual. (Decision, ¶ 12; App. A-5.) The Court of Appeals borrowed the reasoning of the court in *State v. Guzy*, 139 Wis.2d 663, 407 N.W.2d 548 (1987), in conducting its analysis.

Looking at the first factor, the Court found that alternative means of investigation were unavailable to Deputy Miller. (Decision, ¶ 17; App. A-7.) As for the second factor, the Court noted that while further opportunity to investigate Mr. Will's connection to the marijuana operation might not be lost in a broad sense, the opportunity to do so at a time when Mr. Will was readily available to him and when he might have evidence of the crime with him might pass. (Decision, ¶ 17; App. A-7.) The Court failed to address the third factor and, in doing so, missed a crucial consideration highlighted in *Guzy*, which the *Guzy*

court leaned on heavily in its analysis of "reasonableness."

In *Guzy*, the Court gave great weight to the fact that the description of the offender in question was particular enough to allow a law enforcement officer aware of the description "to quickly determine the presence or absence of these features with minimal intrusion" to the individual. 139 Wis.2d at 678, 407 N.W.2d 548. Here, there was no way Deputy Miller could have conducted a stop with minimal intrusion. He had no description of a suspected vehicle, nor a description of the physical traits of a suspected offender. All that he knew was that Mr. Will was present in an area where suspected criminal activity had transpired. Under *Wardlow*, 528 U.S. 119, 120 S.Ct. 693 (2000), this should not be considered enough to support reasonable suspicion, regardless of the inconvenience that lost immediacy might cause a law enforcement officer.

The Wisconsin Court of Appeals, in deciding that the dearth of information available to Deputy Miller under the particular circumstances of the night of the arrest provided reasonable justification for conducting a traffic stop, got its reasoning backwards. A stop to confirm or dispel an officer's broad suspicions cannot be justified or necessitated by a lack of information. Under the circumstances, the fact that Deputy Miller was ignorant of any particularized information should not be deemed to have given him broad license to stop anyone and everyone who passed him. This Court should accept this petition in

order to make it clear to both law enforcement and the lower courts nationwide that a distinct lack of information can never be used to justify an invasion of a person's Fourth Amendment rights.

CONCLUSION

The State of Wisconsin has failed to show that the police officer had any reasonable suspicion that Mr. Will was involved, had been involved, or was about to be involved in any criminal activity. There is nothing linking his vehicle to any criminal activity either. For the above stated reasons, the defendant respectfully requests that this Court grant this writ of certiorari and reverse the decisions of the courts below.

Dated this 8th day of April, 2011.

EISENBERG LAW OFFICES, S.C.

MARK A. EISENBERG
State Bar Number: 01013078
308 E. Washington Avenue
P. O. Box 1069
Madison, WI 53701-1069
(608) 256-8356
mark@eisenberglaw.org

Attorney for Petitioner
Steve J. Will

COURT OF APPEALS
DECISION
DATED AND FILED

August 12, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP723-CR **Cir. Ct. No. 2008CT505**

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVE J. WILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Steve Will appeals the judgment of conviction for operating a motor vehicle while intoxicated (OWI), third offense, in violation of WIS. STAT. § 346.63(1)(a). He contends that a sheriff's

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

deputy who was looking for suspects from a nearby marijuana growing operation did not have reasonable suspicion to stop his vehicle, and therefore the circuit court erred in denying his motion to suppress evidence. For the reasons we explain below, we conclude that under the totality of the circumstances the deputy had reasonable suspicion to stop Will's vehicle. Accordingly, the court properly denied the motion to suppress, and we affirm the judgment of conviction.

BACKGROUND

¶2 Will was stopped by Columbia County Deputy Sheriff Cory Miller at approximately 9 p.m. on October 8, 2008. At the evidentiary hearing on Will's motion to suppress evidence, Deputy Miller and the arresting officer, Village of Rio Police Sergeant Jeff Becker, testified to the circumstances of the stop as follows.

¶3 The Columbia County Sheriff's Department had learned that marijuana plants were growing in a cornfield and had set up an alarm that would be tripped by someone walking in the field toward the plants. Deputy Miller responded when the alarm was tripped on the evening of October 8, 2008. Two deputies were hiding in the cornfield so that they could observe whoever was in the field, and, Deputy Miller believed, they had been there a few hours before the alarm was tripped. Deputy Miller's responsibility and that of a fourth deputy was to watch for vehicles and

stop suspects coming from the marijuana operation along Hall Road, an approximately two-mile stretch that ends at Highway C on one end and at another road on the other end. Deputy Miller parked his vehicle at the corner of Hall Road and Highway C, about a quarter-mile from the alarm's location. Initially, the fourth deputy was stationed at the other end of Hall Road, but at some point he was reassigned to another location.

¶4 After waiting twenty minutes without seeing a vehicle on Hall Road or hearing from the hidden deputies, Deputy Miller, who was standing outside his vehicle, saw Will's truck coming toward him on Hall Road. He shined his flashlight into the vehicle and observed one male, the operator of the vehicle. As the vehicle turned onto Highway C, the deputy shined his flashlight on the license plate and obtained the number. Deputy Miller believed, but was not sure, that the fourth deputy originally stationed at the other end of Hall Road had been reassigned by that time.

¶5 Deputy Miller did not immediately follow Will. He first tried to make radio contact with the deputies in the cornfield to ascertain whether the truck or its driver were associated with the marijuana operation, but he received no response from them. However, a detective sergeant familiar with the case told him over the radio that anyone leaving the area could be a suspect. Deputy Miller did not see any other vehicles on Hall Road while he was trying to contact the deputies. When he was unable to contact

the deputies in the cornfield, he decided to follow Will's truck and stop it because he believed the driver could be someone involved in the marijuana operation.

¶6 Deputy Miller caught up to Will's truck after about eight to ten miles and pulled it over. He did not observe Will commit any traffic violations. After making contact with Will, he noticed the odor of intoxicants coming from him and that he had bloodshot eyes. Sergeant Becker arrived on the scene as backup, at which point Deputy Miller returned to his post at Hall Road because the suspects connected with the marijuana operation had not yet been apprehended and his assistance was needed there. Sergeant Becker administered field sobriety tests and subsequently arrested Will.

¶7 The circuit court denied the motion to suppress and the motion for reconsideration. The court concluded that Deputy Miller had the requisite reasonable suspicion to make an investigative stop.

DISCUSSION

¶8 On appeal, Will renews his contention that Deputy Miller lacked reasonable suspicion that he was involved in the marijuana operation and the stop therefore violated his Fourth Amendment rights.

¶9 The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and an investigative stop is a seizure

under the Fourth Amendment. ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. To be lawful, an investigatory detention must be supported by reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that a person is or was violating the law. ***State v. Colstad***, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. The supreme court has explained that the focus of this test is on reasonableness, with "[t]he fundamental question [being] at what point does the important societal interest in solving crime and bringing offenders to justice *reasonably* justify the specific intrusion on personal security, i.e.,, an investigative stop." ***State v. Guzy***, 139 Wis. 2d 663, 676, 407 N.W.2d 548 (1987) (emphasis in original).

¶10 In reviewing the circuit court's determination, we accept the court's findings of fact unless they are clearly erroneous, and we review de novo the application of those facts to the constitutional standard. ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729. In this case, Deputy Miller and Sergeant Becker were the only witnesses and the circuit court accepted their testimony as credible. We therefore apply the constitutional standard to the events and circumstances described by the officers.

¶11 Will asks us to consider the following six factors utilized by the supreme court in ***Guzy*** to determine whether an investigatory stop was reasonable: (1) the particularity of the description of the defendant or the vehicle in which he fled; (2) the size of the area in which the defendant might be found, as

indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the defendant's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation. ***Guzy***, 139 Wis. 2d at 677 (citing 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3(d) at 461 (2d ed. 1987)).

¶12 The State agrees that consideration of these factors is appropriate and adds the following factors considered by the court in ***Guzy***: (1) whether alternative means of further investigation are available, short of an investigative stop; (2) whether the opportunity for further investigation would be lost if the officer does not act immediately; and (3) what actions following the stop would be necessary for the officer to determine whether to arrest or release the suspected individual. ***Guzy***, 139 Wis. 2d at 678.

¶13 We conclude that the above nine factors are all appropriate to consider. After considering these factors as they apply to the facts of this case, we conclude for the following reasons that Deputy Miller had reasonable suspicion to stop Will's vehicle.

¶14 While Deputy Miller was unable to get a description of the suspect or suspects from the hidden deputies, he knew that Hall Road was "probably the only means of travel from the . . . marijuana grow operation," and that it was in a "very rural" and

remote area. He also knew Hall Road was not heavily travelled and that it would make the most sense for anyone travelling through the area to use Highway C, rather than zigzag onto this short road. It was 9 p.m. and dark outside, from which a reasonable officer could infer that even fewer vehicles would opt to take Hall Road.

¶15 In addition, Will's truck was the only vehicle Deputy Miller saw on Hall Road during the first twenty minutes after the alarm was activated *and* during the additional time he was attempting to gain more information over the radio. Also significant is the twenty minutes between the alarm being tripped and the sighting of Will's vehicle. Given that Will's location was about a quarter-mile from the location of the alarm, twenty minutes is consistent with the time it would take for a suspect to leave the marijuana plants, walk to a vehicle on Hall Road, and drive to the corner of Hall Road and Highway C. *See* ***Guzy***, 139 Wis. 2d at 681 ("the time the deputies sighted the vehicle and its location was consistent with the time of the robbery and the distance a vehicle could have traveled from the robbery scene in that amount of time").

¶16 After seeing Will's truck emerge from Hall Road, Deputy Miller was suspicious, but instead of stopping the vehicle then to investigate, he used alternative means of investigation by attempting to contact the other deputies. Because he was unable to make contact with the deputies hidden in the field, he was unable to obtain a description of any suspect or

learn if anyone had yet been apprehended. However, from the detective sergeant's statement to him over the radio – that anyone leaving the area could be a suspect – it was reasonable for him to infer that a suspect or suspects were still at large.

¶17 Considering the alternatives available to Deputy Miller, we reject Will's contention that the deputy acted unreasonably in stopping him instead of having the deputies in the cornfield look at a photo of Will to determine whether he was seen in the cornfield. According to Will, by using the license plate number, the deputy could have obtained Will's photo from his vehicle registration or driver's license (apparently based on the assumption that Will owned the vehicle). We note that there is no evidence on whether, through what procedure, and in what time frame Will's photo was available to Deputy Miller in this way. However, in any case Deputy Miller would have lost the opportunity to investigate Will's connection to the marijuana operation at the time when Will was readily available to him and when he might have evidence of the crime with him. The same is true of the alternative of using the license plate number to obtain an address for Will (assuming he owned the vehicle) and trying to locate him at that address.

¶18 We agree with Will that his presence in an area of expected criminal activity, standing alone, is not enough to support reasonable suspicion. However, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to

warrant further investigation." ***Illinois v. Wardlow***, 528 U.S. 119, 124 (2000). Thus, while any of the above facts considered alone may well be insufficient to constitute reasonable suspicion, "such facts accumulate, and 'as they accumulate, reasonable inferences about the cumulative effect can be drawn.'" ***Post***, 301 Wis. 2d 1, ¶37 (quoting ***State v. Waldner***, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996)).

¶19 It is also true, as Will argues, that a suspect could have turned the other way down Hall Road where there may not have been a deputy present. However, this does not make it unreasonable for Deputy Miller to suspect that the vehicle that passed his location was connected with the marijuana operation. Deputy Miller did not know whether there were one or more vehicles involved in the events that triggered the alarm. More importantly, the existence of an alternative exit route does not undermine the factors – the amount of time from the alarm and the low probability that someone was driving on Hall Road for another reason – made it reasonable to suspect that the vehicle using *this* exit route (where Deputy Miller was stationed) was coming from the marijuana operation.

CONCLUSION

¶20 We conclude that the stop of Will's truck was supported by the requisite reasonable suspicion. Accordingly, we affirm.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

STATE OF WISCONSIN CIRCUIT COURT
COLUMBIA COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

STEVEN J. WILL,
Defendant.

ORDER

(Filed Dec. 8, 2009)

Case No. 08CT505

WHEREAS, a hearing was held on defendant's motion for reconsideration on December 4, 2009, and the defendant, Steven J. Will, appeared in person and by Attorney Mark A. Eisenberg, and the State of Wisconsin appeared by Assistant District Attorney Troy Cross;

NOW, THEREFORE, for the reasons stated on the record, the defendant's motion for reconsideration of the suppression motion is hereby denied.

Dated this 8 day of Dec, 2009.

BY THE COURT:

/s/ Alan J. White
Alan J. White
Circuit Judge, Branch 3

[SEAL]

OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. Box 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

January 11, 2011

To:

Hon. Alan J. White
Circuit Court Judge
P.O. Box 587
Portage, WI 53901-2157

Susan K. Raimer
Columbia County Clerk
of Circuit Court
P.O. Box 587
Portage, WI 53901-2157

Troy Dean Cross
Asst. District Attorney
P.O. Box 638
Portage, WI 53901-0638

Mark Eisenberg
Eisenberg Law Offices, S.C.
P.O. Box 1069
Madison, WI 53701-1069

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following order:

No. 2010AP723-CR *State v. Will* L.C.#2008CT505

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Steve J. Will, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

A. John Voelker
Acting Clerk of Supreme Court